

**PUBLIC INTEGRITY COMMISSION
MINUTES
October 17, 2017**

- 1. Call to Order:** 10:00 a.m. Present: William F. Tobin, Jr. (Chair); Bonnie Smith (Vice-Chair), Michele Whetzel (Vice-Chair); Commissioners: Jeremy Anderson, Esq., Lisa Lessner; Commission Counsel: Deborah J. Moreau, Esq.
- 2. Approval of Minutes for August 15, 2017:** Moved--Commissioner Lessner; seconded—Commissioner Smith. Vote 4-0, approved (Commissioner Anderson not present).

3. Administrative Items

Commission Counsel provided training to division directors at the Department of Education on September 6, 2017 with approximately 30 attendees.

Commission Counsel conducted training for the State Authority on Radiation Protection in Smyrna on September 25, 2017.

Commission Counsel was the guest speaker at the October 2, 2017 meeting of the Delaware Coalition for Open Government.

Commission Counsel was contacted by the Milford City Manager about providing training for their employees and council members. Counsel will conduct two trainings in Milford on Nov. 13, 2017. In addition, the City will be providing their new employees with our brochure as part of their intake process. Counsel provided the City with the template for the brochure and the City will pick up the cost of printing the brochures.

The City of Milford invited officials from the Town of Millsboro to attend the Nov. 13th trainings.

Commission Counsel contacted the Delaware League of Local Governments to offer training for its members. The DLLG will make our ethics training part of their “training academy” which they run every year from January to June.

- 3. Motion to go into Executive Session¹ to hear requests for Advisory Opinions, Waivers and Referrals:** Moved—Commissioner Lessner, seconded—Commissioner Whetzel. Vote 4-0, approved (Commissioner Anderson not present).

4. 17-24--Personal or Private Interest

[Employee] accepted a position with [a State agency].

[Employee] also maintained a private practice on a part-time basis. She identified two possible conflicts between her State position and her private interest. First, [Employee] was an approved provider for Delaware Medicaid patients. As a consequence, she regularly submitted reimbursement claims to Medicaid’s Highmark and Aetna insurance plans. The state Medicaid

program is administered by the Division of Family Services. Second, [Employee's] clients occasionally asked her to complete FMLA paperwork for submission to their employers. Some of her clients worked for the State. [Employee] recognized that it would be a violation of the Code of Conduct for her to continue to complete FMLA paperwork on behalf of her private clients who were also State employees. As a result, she voluntarily decided to no longer provide that service.

[Employee] asked the Commission to consider whether her continued work as a part-time provider for the state Medicaid program created a conflict of interest with her State position.

1. In their official capacity, employees may not review or dispose of matters if they have a personal or private interest in a matter before them. 29 Del. C. § 5805(a)(1).

A personal or private interest in a matter is an interest which tends to impair a person's independence of judgment in the performance of the person's duties with respect to that matter." 29 Del. C. § 5805(a)(1). As a matter of law, a person has a personal or private interest if any decision "with respect to the matter would result in a financial benefit or detriment to accrue to the person or a close relative to a greater extent" than others similarly situated or if "the person or a close relative has a financial interest in a private enterprise which would be affected" by a decision on the matter to a greater or lesser degree than others similarly situated. 29 Del. C. § 5805(a)(2)(a) and (b). A personal or private interest is not limited to narrow definitions such as "close relatives" and "financial interest." 29 Del. C. § 5805(a)(2). Rather, it recognizes that a State official can have a "personal or private interest" outside those limited parameters. It is a codification of the common law restriction on government officials. See, e.g., *Commission Op. Nos. 00-04 and 00-18*. When there is a personal or private interest, the official is to recuse from the outset and even neutral and unbiased statements are prohibited. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd*, No. 304 (Del., January 29, 1996).

[Employee]'s private practice qualified as a private interest. However, [Employee] did not work for the Division of Family Services, the agency with oversight of Medicaid. As a result, she would not be required to review or dispose of matters involving her private clients when submitting her reimbursement claims to Medicaid. It was possible, although extremely unlikely, that [Employee] would encounter one of her private clients while performing her State job duties. In that case, she would need to have a recusal strategy in place so the client could be assigned to a different [provider]. [Employee] stated she would discuss recusal strategies with her supervisor. In addition, in the unlikely event that one of [Employee's] State clients sought treatment at her part-time practice, [Employee] stated there were 14 other providers to whom the client could be assigned, allowing her to recuse as necessary.

2. Employees may not engage in conduct that may raise suspicion among the public that they are engaging in conduct contrary to the public trust. 29 Del. C. § 5806(a).

The purpose of the code is to insure that there is not only no actual violation, but also not even a "justifiable impression" of a violation. 29 Del. C. § 5802. The Commission treats that as an appearance of impropriety standard. *Commission Op. No. 07-35*. The test is whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the official's duties could not be performed with honesty, integrity and impartiality. *In re Williams*, 701 A.2d 825 (Del. 1997). Thus, in deciding appearance of impropriety issues, the Commission looks at the totality of the circumstances. See, e.g., *Commission Op. No. 97-23 and 97-42*. Those circumstances should be examined within the framework of the Code's purpose which is to

achieve a balance between a “justifiable impression” that the Code is being violated by an official, while not “unduly circumscribing” their conduct so that citizens are encouraged to assume public office and employment. 29 *Del. C.* §§ 5802(1) and 5802(3).

[Employee’s] Division was completely separate from the Division of Family Services and the administration of the State Medicaid program. Furthermore, [Employee] did not work in a general social services building where Medicaid services were located. Given the difference between [Employee’s] State job duties and those performed by Medicaid staff, as well as her geographic separation from locations where Medicaid services were offered, it was unlikely her private interest would raise suspicion among the public that she was engaged in conduct that was contrary to the public trust.

Motion: [Employee] did not have a conflict of interest between her State job and her part-time practice as long as she recused as necessary. Moved—Commissioner Smith; seconded—Commissioner Whetzel. Vote 5-0, approved.

5. 17-22--Complaint

[Employee] was [employed by a Town]. He had held that position since September 2012. [Employee had worked for the Town in other positions since 2008].

In July 2013, the Commission approved the Town’s proposed Code of Conduct. It was adopted and made part of their Town Code in September 2013. However, the Town never created an Ethics Committee or appointed any members to such a committee.

On July 5, 2017, PIC received a Complaint (“*Complaint #1*”) alleging [Employee] violated multiple provisions of the State Code of Conduct. *Complaint #1* was signed by multiple affiants. The affiants were Town employees, past and present. The Complaint asked the Commission to suspend [Employee] from his position until Commission Counsel could investigate the allegations contained therein, a remedy the Commission could not provide. On the same day, PIC received another Complaint (“*Complaint #2*”) filed by [Affiant #14] and an un-notarized letter also alleging [Employee] had violated the Code of Conduct. On July 10, 2017, PIC received two additional un-notarized letters, describing [Employee’s] behavior while acting in his official capacity.

The Commission authorized an investigation on August 18, 2017, and Commission Counsel hired [investigators] to look into the allegations contained in the Complaints.

Complaint #1 alleged [Employee] violated 29 *Del. C.* § 5806(a)(e) and (h) which read as follows:

- (a) Each state employee, state officer and honorary state official shall endeavor to pursue a course of conduct which will not raise suspicion among the public that such state employee, state officer or honorary state official is engaging in acts which are in violation of the public trust and which will not reflect unfavorably upon the State and its government.
- (e) No state employee, state officer or honorary state official shall use such public office to secure unwarranted privileges, private advancement or gain.
- (h) No state employee, state officer or honorary state official, in the course of

public responsibilities, shall use the granting of sexual favors as a condition, either explicit or implicit, for an individual's favorable treatment by that person or a state agency.

Complaint #2 alleged violations of subsections (e) and (h).

I. Procedure

A properly sworn Complaint must be notarized pursuant to 29 *Del. C.* § 4328(3). *Complaint #1* was notarized by 13 affiants. After reading the transcribed interviews it was clear that none of the 13 affiants could attest to the Complaint in its entirety. Rather, each affiant could only attest to the allegations related to their Town position. As a result, there was a procedural defect in *Complaint #1* which would fail examination by a reviewing court. *Hanson v. PIC*, 2012 WL3860732 (Del Super., Aug. 30, 2012) (*aff'd PIC v. Hanson*, 69 A.3d 370 (Del. 2013)). Despite the defect, the Commission decided to review *Complaint #1* as if it were properly notarized under the theory that the defect could be easily corrected by asking each affiant to re-submit their Complaint separately. *Complaint #2* was properly notarized.

The un-notarized letters submitted in the matter did not qualify as Complaints. As a result, the letters were used for informational purposes only.

II. Jurisdiction

The Commission's jurisdiction is limited to interpreting Title 29, *Del. C.*, ch. 58. See, e.g., 29 *Del. C.* § 5808(a) and § 5809(2). It may only act if it has jurisdiction over the party charged and jurisdiction over the Complaint's substance.

A. Personal Jurisdiction

[Employee] worked for [a Town]. The Town previously sought the Commission's approval of their own Code of Conduct pursuant to 29 *Del. C.* § 5802(4). The provision states "[i]t is the desire of the General Assembly that all ...municipalities...adopt code of conduct legislation at least as stringent as this act to apply to their employees and elected and appointed officials." *Id.* The Commission approved the Town's Code of Conduct in September 2013 and it was subsequently adopted by the Town. However, the Town failed to follow through and create an Ethics Commission. While the Town technically adopted their own Code of Conduct, it could not be the intent of the legislature to allow municipalities to adopt their own Code of Conduct and then fail to administer the applicable provisions. The Delaware Supreme Court has held "[t]he goal of statutory construction is to determine and give effect to legislative intent." *LeVan v. Independence Mall*, 940 A.2d 929, 932 (Del. 2007). As a result, [Employee] remained under the PIC's jurisdiction.

B. Subject Matter Jurisdiction:

As stated above, the Complaints alleged violations of 29 *Del. C.* § 5806 (a)(e)(h). *Complaint #1* did not match specific facts with applicable violations of the Code of Conduct and [contained an extensive list of allegations]. *Complaint #2* alleged harassment pursuant to 29 *Del. C.* § 5806(e)(h).

There was no doubt that [Employee] acted in an unprofessional, offensive and deplorable manner. It was also clear that the Town Council had done nothing over the past

seven years to correct his behavior or hold him accountable. In desperation, the Complainants explored every available avenue in order to seek a remedy. However, as sympathetic a cause as *Complaint #1* presented, the Commission's jurisdiction was limited to administering the laws in Title 29, Chapter 58. *Commission Op. No. 95-05*. The Commission had previously decided that it had "no jurisdiction over personnel laws" (*Commission Op. No. 97-28*) or "allegations of sexual harassment such as 'leering,' making sexual comments, etc., [which] are governed by laws and regulations administered by such entities as the Equal Employment Opportunity/Affirmative Action (EEO/AA) section under State Personnel, or the Department of Labor, or certain federal offices. Similarly, allegations of racism are governed by laws and regulations administered by such entities." *Commission Op. Nos. 91-16, 98-42, 00-22*.

While the Code of Conduct did have a provision regarding harassment (§ 5806(h)), the Commission had interpreted it as applying to interactions between government actors and third parties (*Commission Op. Nos. 98-42, 00-22*), such as vendors and contractors. The reason for that interpretation was the underlying purpose of the Code of Conduct. When creating the Code of Conduct, the legislature declared legislative findings and statement of policy. 29 *Del. C.* § 5802(1)-(4). Subsection (2) stated "[t]o ensure propriety and to preserve public confidence, officers and employees...must have the benefit of specific standards to guide their conduct..." The inclusion of § 5805(e) must be read in the context of the Code of Conduct (i.e. personal and private interest, conflicts of interest). The purpose of the statute was never intended to be a substitute for state and federal discrimination law. If the statute were to be interpreted otherwise, any harassment claim between two state employees would fall within the Commission's jurisdiction. Nothing in the legislature's findings indicate that they intended to abrogate state harassment laws. As a result, the harassment allegations were only considered by the Commission as they related to [Employee] and third parties who were not employed by the Town at the time of the conduct. In this case, [Affiant #14], presented the only harassment allegation over which the Commission may have had jurisdiction. (*Complaint #2*).

The same reasoning applied to § 5806(a), the appearance of impropriety standard. It too must be interpreted in the context of the Code of Conduct's purpose. To interpret the standard otherwise would allow the provision to apply to behaviors that are not otherwise violations of the Code of Conduct. For example, if two State employees were engaged in an extra-marital affair it would likely create an appearance of impropriety amongst their colleagues and the public. However, their conduct would not fall within the Commission's jurisdiction, no matter how egregious. As a result, [Employee]'s behavior was not a violation of the Code of Conduct's appearance of impropriety standard.

The one exception to the appearance of impropriety allegations were those made by [Employee B] (*Complaint #1*). According to *Complaint #1*, [Employee] would intervene in matters pending before [Employee B] and substitute his own judgment based upon whether he did, or did not, like the particular citizen. Therefore, the appearance of impropriety alleged in *Complaint #1* was grounded in a violation of 29 *Del. C.* § 5805(a), allowing professional judgment to be affected by personal interests.

29 *Del. C.* § 5806(e) prohibits the use of government property for private advancement or gain. In March 2014, [Employee] used his Town vehicle to drive [out-of-state]. Assuming [Employee] travelled on private business, he saved the expense of fuel for his personal vehicle or the cost of a rental car. Therefore, the allegation in *Complaint #1* regarding [Employee], and his family member's use of Town vehicles, did appear to set forth adequate facts upon which the Commission could find that he violated the Code of Conduct.

The Commission decided to dismiss allegations 1-6 and 9-13 in *Complaint #1* for lack of subject matter jurisdiction. The Commission then considered the remaining allegations and *Complaint #2*.

III. Properly Alleged Allegations

A. Improper Interference with the Building Inspector

[Employee B] had worked for the Town for 17 years. [Employee B] was interviewed by [investigators] on August 16, 2017. According to the statements made by the other Complainants, [Employee B] was a somewhat aloof employee who preferred to work alone and didn't go out of his way to exchange pleasantries with other employees. [Employee B] claimed that [Employee] had interfered with his job duties by singling out specific people for special treatment. The following examples were taken from [Employee B's] transcribed interview.

The First Example: In 2015, [Employee] told [a resident] that she did not need a permit after [Employee B] had already told her that a permit was required and the fee would be \$300. [Employee] told [Employee B] that he thought the necessity of a permit was "over-conscientious." In the end, [the resident] was not required to get a permit. [Employee B] intimated that [Employee] was friends with [the resident] but he did not provide further information as to how they knew each other or the length of the acquaintance. [Employee] denied knowing [the resident] prior to discussing her permit.

The Second Example: In 2016, a contractor told [Employee B] that [Employee] had told the homeowner that he did not need a permit to repair damage to his property. [Employee B] did not ask [Employee] for further details about the conversation because [Employee] was [on an extended vacation].

The Third Example: In 2014 and 2015, [Employee B] received complaints about contractors on a project working on holidays and weekends in violation of the Town Code. When [Employee B] confronted the contractors they claimed to have received permission from [Employee]. [Employee B] asked [Employee] about the extra work hours and [Employee] stated he told the contractor it was ok to work outside regulated hours as long as they worked indoors. Since then the Town has passed an ordinance formalizing the Town's construction hours.

The Fourth Example: A resident rented his property. [Employee B] had cited and fined [the resident] in 2015, for failure to obtain a rental license. The next year, [Employee B] again fined [the resident] for failure to obtain a rental license. [The resident] called [Employee] and explained extenuating circumstances and [Employee] negated the citation. There was no mention of the 'extenuating circumstances' but [the resident] died four months later. The Commission did not see how [Employee's] actions were motivated by a personal or private interest.

The Fifth Example: [Employee B] transferred a permit [from one business to another]. [Employee] was upset about the transfer because he received reports from citizens that the work being done on the building was in excess of the permit. The matter was eventually sent to the Town attorney for his review. The Town attorney was able to put [Employee] "at ease" with the work on the property.

The Sixth Example: [Employee B] granted a permit to [the owner of a new business in

an established location]. [Employee] was upset because he didn't think [the permit was eligible to be transferred]. [Employee] asked [Employee B] to advise him when he was going to issue a Certificate of Occupancy because he wanted to check with the Town attorney about the issue. "Q. Did [Employee] interfere with the issuance of the certificate of occupancy after you informed him that you were going to issue it? A. No." *Transcript of [Employee B], 53:19-23.*

The Seventh Example: A business was granted a permit to remain open past usual business hours. When the business was taken over by new owners they changed the name of the business. [Employee B] continued the permit obtained by the previous owner to allow [the new business] to remain open [until the same time]. [Employee] did not think that the conditional use permit as it was originally granted was legitimate. After researching the issue, it came to light that the conditional use was never recorded despite having all the proper documentation and signatures. The matter was turned over to the Town attorney and the business was still operating under the conditional use permit.

The Eighth Example: The owner of [a] business, wanted to install a retractable canopy over an outside eating area. Because the [business] was a nonconforming business in a nonconforming building, an issue was raised as to whether the awning was an expansion of a nonconforming building. The matter was turned over to the Town attorney. In the meantime, [Employee] told [Employee B] and the former mayor that he did not want them talking about the project. "Q. But was that because [the Town solicitor] was looking into the legality? A. Yeah." *Transcript 61:19-21.*

The Ninth Example: [Employee B] told [Employee] that the next phase of a project could not move forward until the Town had received all of the required plans and approvals from various agencies. [Employee] did not object to [Employee B's] statement.

The Tenth Example: In January 2017, [a resident] approached [Employee] about activity taking place near her complex. [Employee B] stated that [Employee] and [the resident] were friends. [Employee] asked [Employee B] about the project and [Employee B] showed him the relevant paperwork. [Employee] continued to contact [Employee B] stating that he heard the project was [noncompliant]. [Employee] then told [Employee B] not to issue [an approval]. The matter was sent to the Town attorney who concluded that the project was legitimate. "Q. On this particular case where [Employee]'s friend...was involved, any investigations that [Employee] asked you to undertake or any of the complaints that [Employee] asked you to look into, did any of those delay the certificate of occupancy? A. No. Fortunately, they didn't." *Tr. 68:19-24; 69:1-2.*

The Eleventh Example: A friend of [Employee], complained about a permit issued by [Employee B] to an adjacent property owner. [Employee B] showed [Employee] the paperwork and the matter was dropped.

The Twelfth Example: [Employee B] approved a resident's request [regarding his property]. [There was a disagreement about how to interpret the applicable statute]. [Employee B] made a unilateral interpretation of the Code and allowed the [resident to make the requested changes]. [Employee] then called a meeting to discuss why [Employee B] had allowed the [change]. He then told [Employee B] that he disagreed with his interpretation of the Code.

The Thirteenth Example: [Employee] told [Employee B] to grant permits to [residents] in contravention of the Town Code. [Employee B] denied [one resident's request and the matter was appealed to the Town] which granted the request.

The Fourteenth Example: [Employee B] issued a permit to allow a company to place a dumpster across some of the Town's parking spots. [Employee] asked [Employee B] to make sure the dumpster would be removed before the weekend. The construction foreman stated they would not be able to meet that deadline. When [Employee B] relayed that information to [Employee] a loud argument ensued. The Town and the contractor eventually reached a deal where the contractor paid to leave the dumpster in place for a few extra days.

In the above examples, the Commission decided there was insufficient factual evidence upon which to base a finding that [Employee] allowed his personal or private interests to affect his professional judgment while performing his job duties. One issue that demonstrated [Employee]'s lack of a private interest was that [Employee B] claimed that [Employee] did not like [a particular resident] and that was why [a specific request] had not been approved. On the other hand, he also alluded to the fact that the construction workers on another project (also owned by the resident) were afforded special treatment because they were allowed to work on holidays and weekends.

B. Misuse of Town Property for Personal Gain

1. The Use of the Car Leased by the Town

Complaint #1 alleged that a car leased to the Town was driven by [Employee] on a personal trip where it was subsequently involved in an accident. The allegation further stated that [Employee] attempted to cover-up the accident. Commission Counsel requested copies of [Employee's] employment contract, the accident report and any email communications between [Employee] and the Town Council regarding the motor vehicle accident.

The documentation revealed the car was originally leased at the request of [a previous Town employee]. [Employee]'s employment contract gave him "full use" of the car." The contract did not define the term "full use" and so it was given its ordinary meaning. 1 *Del. C. § 301 & § 303*. "Use" is defined as "to avail oneself of; to utilize." *Black's Law Dictionary*, 1541 (6th ed. 1990). In addition to the allegation that [Employee] misused the Town vehicle by driving it for personal use, *Complaint #1* stated that [Employee] tried to "cover-up" the accident. The supporting documents obtained from the Town did not support that allegation. The accident report was dated March 23, 2014. The Town provided copies of emails between [Employee], the Town's insurance carrier and various Town Commissioners beginning on March 23, 2014, through June 25, 2014. The emails showed that [Employee] did not attempt to hide the accident from the Town Council as alleged.

2. The Ticket

Complaint #1 alleged that [Employee's] daughter drove the Town vehicle on at least one occasion which came to light when the Town received a copy of a speeding ticket.

During the interviews some of the Complainant's stated that [Employee]'s daughter was issued a speeding citation while others stated it was a red light violation. Similarly, some of the

Complainants believed the violation happened in North Carolina while others thought it was in Maryland. According to the Complainants, the ticket was sent via U.S. Mail to Town Hall and opened by an employee who was deceased. No one else saw the original ticket and knowledge about the issue was based on hearsay, sometimes second and third-hand. Upon request, the Town Attorney provided a copy of the canceled check that was used to pay the fine. The check was drawn on [Employee]'s personal checking account. No Town funds were used to pay for the citation.

The Commission decided that, given the fact that [Employee]'s employment contract gave him "full use" of the Town vehicle and the citation was paid for out of [Employee]'s personal funds, the Complaint did not set forth sufficient facts on which to base a finding that [Employee] misused Town property for personal gain by driving the car [out-of-state] or by allowing his daughter to drive the car.

C. Sexual Harassment

[Affiant #14 was responsible for paying] business license fees. Traditionally, [Affiant #14] paid the license fees [in May] although the official due date was March 31st each year. According to *Complaint #2*, in a March 2016, phone call, [Employee] demanded that the license fees be paid immediately. [Affiant #14] went to Town Hall the next day, March 22, 2016, and paid the outstanding license fees. As she was approaching the window to drop off the payments, [Employee] opened a door and asked her to come back to his office. [Affiant #14] took a seat in front of the desk and, rather than sit behind the desk, [Employee] sat in a chair next to [Affiant #14]. [Employee] then placed his hand on her thigh and said something along the lines of "if you play your cards right, you could have my job one day." [Affiant #14] immediately felt uncomfortable and stood up to leave. She had to wait for [Employee] to stand up so she could get past him to the door. [Affiant #14] stated that she felt harassed. She had returned to Town Hall twice since then and had taken other people with her so as not to create a situation where she was alone with [Employee].

29 *Del. C. § 5806(h)* reads: "No [Town official] in the course of public responsibilities, shall use the granting of sexual favors as a condition, either explicit or implicit, for an individual's favorable treatment by that person... ." During her interview [Affiant #14] was asked whether she had ever expressed an interest in replacing [Employee]. [Affiant #14] stated she had never considered it and found the idea laughable as she earned a lot more money in her position than [Employee] did. *Transcript, 29: 20-24*. Other than alluding to the fact that [Affiant #14] could have his job, it was unclear what favorable treatment [Employee] would be able to offer [Affiant #14]. [Affiant #14] did mention that [her employer] was considering applying for a permit but was getting pushback from the Town. She speculated that perhaps [her employer] was on [Employee]'s enemies list as described in *Complaint #1* but the approval issue was raised well after the incident in [Employee]'s office.

The Commission could not determine that [Employee] was implicitly offering [Affiant #14] an employment opportunity in exchange for favors. Although his behavior was bizarre and uncomfortable, there did not appear to be a *quid pro quo*. That was especially true given the fact that [Affiant #14] stated that she and [Employee] had never discussed her taking his job, nor did she have any desire to do so. That did not mean the Commission found the behavior within the bounds of normal business interaction, only that the statute required a request for favors in exchange for favorable treatment (in the context of a government official), which did not exist. Even [Affiant #14] admitted she was unable to guess at a reason for [Employee]'s behavior.

Motion: The allegations in *Complaint #1* and *Complaint #2* were dismissed for lack of subject matter jurisdiction or for failure to allege sufficient facts upon which the Commission could find a violation of the Code of Conduct. Moved—Commissioner Anderson; seconded Commissioner Whetzel. Vote 4-0, approved. (Commissioner Tobin recusing).

6. 17-33--Personal or Private Interest

[Employee] was the Director of [a Division of a State agency]. Her Division contracted with several companies to provide [a service to certain] citizens. The contracts were paid for with a mix of state and federal funds.

[Employee] also volunteered at fundraising events for [a local charity]. In exchange, they were permitted free entrance into the event. Monies raised at fundraising events were divided “equitably” between providers in the state. [The charity] did not contract with [Employee’s] Division.

[Employee] asked the Commission to consider whether her volunteer activities created a conflict of interest with her State position.

1. In their official capacity, employees may not review or dispose of matters if they have a personal or private interest in a matter before them. 29 Del. C. § 5805(a)(1).

A personal or private interest in a matter is an interest which tends to impair a person’s independence of judgment in the performance of the person’s duties with respect to that matter.” 29 Del. C. § 5805(a)(1). As a matter of law, a person has a personal or private interest if any decision “with respect to the matter would result in a financial benefit or detriment to accrue to the person or a close relative to a greater extent” than others similarly situated or if “the person or a close relative has a financial interest in a private enterprise which would be affected” by a decision on the matter to a greater or lesser degree than others similarly situated. 29 Del. C. § 5805(a)(2)(a) and (b). A personal or private interest is not limited to narrow definitions such as “close relatives” and “financial interest.” 29 Del. C. § 5805(a)(2). Rather, it recognizes that a State official can have a “personal or private interest” outside those limited parameters. It is a codification of the common law restriction on government officials. See, e.g., *Commission Op. Nos. 00-04 and 00-18*. When there is a personal or private interest, the official is to recuse from the outset and even neutral and unbiased statements are prohibited. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff’d.*, No. 304 (Del., January 29, 1996).

[Employee] did not make official decisions about [the charity] while performing her State job duties. Nor did she have any involvement in determining how the [charity’s] proceeds were distributed. As a result, the Commission could not see how her volunteer activities created a conflict of interest with her State position.

2. Employees may not engage in conduct that may raise suspicion among the public that they are engaging in conduct contrary to the public trust. 29 Del. C. § 5806(a).

The purpose of the code is to insure that there is not only no actual violation, but also not even a “justifiable impression” of a violation. 29 Del. C. § 5802. The Commission treats that as an appearance of impropriety standard. *Commission Op. No. 07-35*. The test is whether a

reasonable person, knowledgeable of all the relevant facts, would still believe that the official's duties could not be performed with honesty, integrity and impartiality. *In re Williams*, 701 A.2d 825 (Del. 1997). Thus, in deciding appearance of impropriety issues, the Commission looks at the totality of the circumstances. See, e.g., *Commission Op. No. 97-23* and *97-42*. Those circumstances should be examined within the framework of the Code's purpose which is to achieve a balance between a "justifiable impression" that the Code is being violated by an official, while not "unduly circumscribing" their conduct so that citizens are encouraged to assume public office and employment. 29 *Del. C.* §§ 5802(1) and 5802(3).

As long as [Employee] did not make decisions about [the charity] or the allocation of their funds, it was difficult to see how her volunteer work would create an appearance of impropriety.

The Commission further advised that the value of the waived entrance fees did not need to be reported as a 'gift' on [Employee]'s annual Financial Disclosure report because she provided consideration of equal or greater value through her volunteer activities. 29 *Del. C.* § 5812(h).

Motion: [Employee]'s volunteer activities with [the charity] did not create a conflict of interest with her State job duties. Moved—Commissioner Whetzel; seconded Commissioner Lessner. Vote 5-0, approved.

7. 17-31--Complaint

On August 23, 2017, PIC received two *Complaints* against a councilman for [a Town]. [The councilman] was elected to a two-year term on the Town Council in September 2015, and did not run for re-election in 2017. His last day as a councilman was September 22nd and one of his last acts was to vote to approve [a measure involving his wife's supervisor].

The Complaints were submitted by [two of the Town's] property owners. The Complainants alleged that [the councilman] violated the Code of Conduct's Conflict of Interest provision, 29 *Del. C.* § 5805(a), by voting on matters related to [his wife's supervisor]. At the time the Complaints were submitted, [the spouse] was a contract employee of the Town. She resigned from her position shortly after the Complaints were filed.

On August 29th, the Complainants sent a letter via email to the Mayor and Town Council advising they would drop their Complaints if [the councilman] sought advice from PIC. Commission Counsel contacted the Town attorney and extended the offer for an advisory opinion. The Town attorney responded in a letter dated September 1st, 2017, declaring that [the spouse's] resignation effectively ended any conflict of interest [the councilman] may have had.

At the September 22nd Town Council meeting, the Town attorney made a statement on the record that he had advised [the councilman] that he did not have a conflict of interest and that it would be permissible for him to vote on [the pending matter].

I. Procedure

A properly sworn Complaint must be notarized pursuant to 29 *Del. C.* § 4328(3). *Hanson v. PIC*, 2012 WL3860732 (Del Super., Aug. 30, 2012) (*aff'd PIC v. Hanson*, 69 A.3d 370 (Del. 2013)). The Complaints were properly notarized.

II. Jurisdiction

The Commission's jurisdiction was limited to interpreting Title 29, Del. C., ch. 58. See, e.g., 29 Del. C. § 5808(a) and § 5809(2). It may only act if it has jurisdiction over the party charged and jurisdiction over the complaint's substance.

A. Personal Jurisdiction

[The councilman] was a [Town] official. The town previously sought the Commission's approval of their own Code of Conduct pursuant to 29 Del. C. § 5802(4). The provision states "[i]t is the desire of the General Assembly that all ...municipalities...adopt code of conduct legislation at least as stringent as this act to apply to their employees and elected and appointed officials." *Id.* The Commission approved the Town's Code of Conduct in September 2013 and it was subsequently adopted by the Town. However, the Town failed to follow through and create an Ethics Commission. While the Town technically adopted their own Code of Conduct, it could not be the intent of the legislature to allow municipalities to adopt their own Code of Conduct and then fail to administer the applicable provisions. The Delaware Supreme Court has held "[t]he goal of statutory construction is to determine and give effect to legislative intent." *LeVan v. Independence Mall*, 940 A.2d 929, 932 (Del. 2007). As a result, [the councilman] remained under the PIC's jurisdiction.

B. Subject Matter Jurisdiction:

The Complaints alleged violations of 29 Del. C. § 5805(a) which was within the Commission's jurisdiction. *Commission Op. No. 95-05.*

III. Allegations

In their official capacity, honorary state officials may not review or dispose of matters if they have a personal or private interest in a matter before them. 29 Del. C. § 5805(a)(1).

"A personal or private interest in a matter is an interest which tends to impair a person's independence of judgment in the performance of the person's duties with respect to that matter." 29 Del. C. § 5805(a)(1). A person has a personal or private interest when they, or a close relative, have a financial interest in a private enterprise." 29 Del. C. 5805(a)(2). 'Matter' is defined as "any application, petition, request, business dealing or transaction of any sort." 29 Del. C. § 5804(7). As a matter of law, a person has a personal or private interest if any decision "with respect to the matter would result in a financial benefit or detriment to accrue to the person or a close relative to a greater extent" than others similarly situated or if "the person or a close relative has a financial interest in a private enterprise which would be affected" by a decision on the matter to a greater or lesser degree than others similarly situated. 29 Del. C. § 5805(a)(2)(a) and (b). A close relative is defined as "parents, spouse, children...and siblings of the whole and half-blood." 29 Del. C. § 5804(1).

The concern under the common law restriction on public officials participating in decisions where they have a personal or private interest is the same as would arise under the State Code prohibition which restricts such officials from "reviewing and disposing of matters in which they have a personal or private interest that tends to impair independence of judgment." See, 29 Del. C. § 5805(a)(1). The Courts' concern is that decisions be based on a "fair and unadulterated examination of the merits" and that "any conduct giving the appearance that

impropriety is involved therein should be studiously avoided.” See, *Kulesza v. Star Services Inc.*, Del. Super., C.A. No. 93A-01-002, n. 8, J. Toliver (December 20, 1993) (expressing the court’s concern for any deviation from the administrative process as provided by law or participation in ex parte communications between one party and those charged with reviewing the merits for the State agency). Moreover, conflict of interest statutes generally do not abrogate common law conflict of interest principles. *63C Am. Jur. 2d Public Officers and Employees* § 253 (1997). Thus, the State Code is basically a codification of the common law restrictions which Delaware Courts have recognized as encompassing more than pecuniary interests.

[The councilman] reportedly voted on [the supervisor’s] contract renewal in 2015, while his wife was employed by the Town and reporting directly to [the supervisor]. He also voted [on two other matters involving his wife’s supervisor]. [The councilman] participated in those votes after consultation with the Town’s attorney, but did not consult with PIC.

The Commission decided that [the spouse] clearly fell within the definition of a close relative as defined by the statute. Next, the Commission considered the three votes alleged to be in violation of the Code of Conduct. First, [the councilman] voted in favor of [a matter adverse to the supervisor]. That act would appear to be a direct contradiction of the allegations in the Complaints. Second, the Commission considered [the councilman]’s vote just after his wife’s resignation. At that point, [the wife’s resignation had removed] any conflict of interest. Third, the Commission considered [the councilman]’s vote to renew [the supervisor’s] employment contract. While [the supervisor] was [the spouse’s boss], that alone was not enough to create a conflict of interest requiring [the councilman]’s recusal. If [the councilman] had been voting on a matter directly involving his wife, he would have had a conflict of interest. However, the Commission was unable to reach the conclusion that [the councilman]’s vote on the employment contract was affected by [his wife’s] employment with the Town. The fact alleged in the Complaints was that the [councilman and his wife] lived a few doors down from the [supervisor] and the proximity of their homes “...creates a conflict of interest due to the presumed social relationship between the parties” was insufficient to sustain an allegation of a personal or private interest. In fact, Delaware Courts have held that for the interest to be sufficient [to constitute a conflict of interest] the allegation of a conflict cannot be merely conclusory, without supporting facts. *Shellburne*, 238 A.2d at 331; *Camas v. Delaware Board of Medical Practice*, Del. Super., C.A. No. 95A-05-008, Graves, J. (November 21, 1995). In *Camas*, the Delaware Superior Court held that the mere allegation of a familial relationship without additional facts to support a charge of a conflict of interest was insufficient to state a claim. The familial relationship in that case was one of husband and wife. *Id.* As a result, the Commission decided that [the councilman] did not violate the Code of Conduct’s conflict of interest provisions when he voted on matters related to [the supervisor] and the Complaints were dismissed.

The Commission pointed out that only an advisory opinion from the Commission, in advance of any action or inaction which could constitute a violation of the Code of Conduct, provided legal protection to the requestor in the event a formal Complaint was lodged against them. In this case, had [the councilman] sought that advice, the Complaints would have been dismissed with no further consideration.

Motion: The Complaints were dismissed for failure to allege sufficient facts upon which the Commission could find a violation of the Code of Conduct. Moved—Commissioner Anderson; seconded—Commissioner Lessner. Vote 4-0, approved. (Commissioner Tobin recusing).

8. 17-32--Personal or Private Interest

[Employee] worked for [a State agency] in Sussex County.

In addition to his State job, [Employee] was the co-founder and president of [a private business]. [The private business served the same segment of the population as Employee's State agency]. [Employee] started the business in July 2016, with his friend who served as the vice-president and manager of [the private business]. [The private business'] board consisted of [Employee], [his friend] and their spouses. [Employee] denied being involved in the day-to-day operations of [the private business]. As president, [Employee] was responsible for business development, banking, financing fund raising and other behind-the-scenes work. [His friend] was responsible for the day-to-day operations of [the business]. [The business] was funded through payments by the clients and through donations from the community. They did not receive funding from any government entities.

In the past year, [the private business] had 26 clients, 12 of whom were also served by [Employee's State agency]. [Employee] denied recruiting clients through [the agency] and stated that all [of the private business'] applicants were required to go through [his friend] to determine if they were eligible [for services]. [The business] received referrals through word-of-mouth [and two private businesses that contracted with Employee's State agency]. [Employee] asked the Commission to consider whether his work with [the private business] created a conflict of interest with his State position.

1. In their official capacity, employees may not review or dispose of matters if they have a personal or private interest in a matter before them. 29 Del. C. § 5805(a)(1).

A personal or private interest in a matter is an interest which tends to impair a person's independence of judgment in the performance of the person's duties with respect to that matter." 29 Del. C. § 5805(a)(1). As a matter of law, a person has a personal or private interest if any decision "with respect to the matter would result in a financial benefit or detriment to accrue to the person or a close relative to a greater extent" than others similarly situated or if "the person or a close relative has a financial interest in a private enterprise which would be affected" by a decision on the matter to a greater or lesser degree than others similarly situated. 29 Del. C. § 5805(a)(2)(a) and (b). A personal or private interest is not limited to narrow definitions such as "close relatives" and "financial interest." 29 Del. C. § 5805(a)(2). Rather, it recognizes that a State official can have a "personal or private interest" outside those limited parameters. It is a codification of the common law restriction on government officials. See, e.g., *Commission Op. Nos. 00-04 and 00-18*. When there is a personal or private interest, the official is to recuse from the outset and even neutral and unbiased statements are prohibited. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd*, No. 304 (Del., January 29, 1996).

In determining if there was a conflict of interest, the Commission evaluated the amount of crossover between the State employment and the private interest. At first glance it was concerning that almost 50% of [the private business'] clients were also clients of [Employee's State agency]. However, the Commission decided that number was statistically insignificant considering [various factors]. The numbers *did* accentuate the fact that [the private business] was likely to continue to have clients who were [also served by the State agency]. The Commission then considered the likelihood that one of [Employee's] State clients would also receive services from [his private business]. [Employee] stated that it was unlikely such a

scenario would occur. The agency's [employees were not assigned clients from the geographic location of the private business]. Therefore, the likelihood one of his State clients would also receive services from [the private business] was extremely low.

When [Employee] was asked how clients were made aware of [his private business], he stated that two entities (who also contracted with the State), had referred clients to [his business]. [His business] did not pay monies to those two entities, nor did they pay [his business]. Otherwise, clients learned about [the business] through Facebook or word-of-mouth. [Employee] denied receiving referrals from his State co-workers. As a result, the Commission did not have any concerns that he would use his State position to recruit clients for [his business].

As to funding, [Employee] stated that [the business'] funds were a combination of donations and weekly payments by the clients. [The business] did not seek State funds, so there was no conflict of interest between his State job duties and the monies received by [the business].

2. Employees may not engage in conduct that may raise suspicion among the public that they are engaging in conduct contrary to the public trust. 29 Del. C. § 5806(a).

The purpose of the code is to insure that there is not only no actual violation, but also not even a "justifiable impression" of a violation. 29 Del. C. § 5802. The Commission treats that as an appearance of impropriety standard. *Commission Op. No. 07-35*. The test is whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the official's duties could not be performed with honesty, integrity and impartiality. *In re Williams*, 701 A.2d 825 (Del. 1997). Thus, in deciding appearance of impropriety issues, the Commission looks at the totality of the circumstances. See, e.g., *Commission Op. No. 97-23* and *97-42*. Those circumstances should be examined within the framework of the Code's purpose which is to achieve a balance between a "justifiable impression" that the Code is being violated by an official, while not "unduly circumscribing" their conduct so that citizens are encouraged to assume public office and employment. 29 Del. C. §§ 5802(1) and 5802(3).

[Employee] worked with a similar population of people in his State job and at [his private business]. Consequently, he had to be very careful to avoid even the appearance of impropriety. To that end, he could not reference his State job title when acting in his capacity as president of [the private business]. That prohibition included, but was not limited to, references to his State job on the internet, Facebook and other forms of media. Additionally, he could not use State time or resources to the benefit of [his private business].

Motion: [Employee]'s private interest did not create a conflict of interest with his State job duties. Moved—Commissioner Anderson; seconded--Commissioner Whetzel. Vote, 4-0. (Commissioner Tobin recusing).

9. 16-52 Joanne White—Waiver Extension



STATE OF DELAWARE
DELAWARE STATE PUBLIC INTEGRITY COMMISSION

MARGARET O'NEILL BUILDING
410 FEDERAL STREET, SUITE 3
DOVER, DELAWARE 19901

TELEPHONE: (302) 739-2399
FAX: (302) 739-2398

VIA EMAIL

October 31, 2017

Hearing and Decision By: *William F. Tobin, Jr., (Chair); Bonnie Smith (Vice Chair), Michele Whetzel (Vice Chair); Commissioners: Lisa Lessner, Jeremy Anderson, Esq.*

Dear Ms. White,

Thank you for attending the Commission meeting on October 17, 2017. After consideration of all the relevant facts and circumstances, the Commission decided to GRANT your agency's request for a six month extension of the waiver previously granted to your agency in October 2016. The Commission's reasoning is set forth below.

I. FACTS

You are the Director of the Women, Infants and Children ("WIC") program within the Division of Prevention and Behavioral Health Services ("PBHS"), Department of Services for Children, Youth and their Families ("DSCYF"). WIC is a program designed to help low-income pregnant, postpartum, and breastfeeding women, infants, and children under the age of 5 who are at nutritional risk. WIC provides vouchers to qualified individuals so they can obtain nutritious foods to supplement their diet, provides information about healthy eating options including breastfeeding, and makes referrals to health care.¹

In order to qualify for a federal grant, the WIC program must have a Nutrition Coordinator. Laura Peppelman, Delaware's Nutrition Coordinator, retired on September 30th after 17 years of service. Two months prior to Ms. Peppelman's retirement, you posted the anticipated job vacancy on the State's website. To qualify for the position, candidates must be a Registered Dietician with three years of experience. In Delaware, there are 299 registered dieticians whose median annual salary is between \$47,000 and \$56,000. The posting resulted in only two qualified applicants. One applicant withdrew her application after learning of the offered salary, \$44,000 per year. The other applicant was interviewed and offered the position but she declined when she too learned of the salary.

¹ www.womeninfantschildrenoffice.com

In addition to administering the Nutrition Assistance Program, the employee serves as a preceptor to Dietetic Interns at the University of Delaware and also serves on the University's Intern Selection Committee. Your Division often recruits employees from the University's intern program.

You were concerned that the continued job vacancy would affect WIC's ability to meet their obligations to the University and the current class of Dietetic Interns as well as maintaining WIC's eligibility for the federal grant. You asked the Commission for a waiver of the two year post-employment restriction to allow PBHS to contract with Ms. Peppelman until you could fill her position, which was granted.

At the October 2017, meeting you stated that you had been able to hire someone to replace Ms. Peppelman. Your new employee's start date is in December 2017. You asked the Commission to extend the previously granted waiver for six months to allow Ms. Peppelman to train the new employee.

II. APPLICATION OF THE FACTS TO THE LAW

A. For 2 years after leaving State employment, State employees may not represent or otherwise assist a private enterprise on matters involving the State, if they are matters where the former employee: (1) gave an opinion; (2) conducted an investigation, or (3) were otherwise directly and materially responsible for the matter while employed by the State. 29 Del. C. § 5805(d).

One reason for post-employment restrictions is to allay concerns by the public that ex-government employees may exercise undue influence on their previous co-workers and colleagues. *United States v. Medico*, 784 F.2d 840, 843 (7th Cir., 1986). Nevertheless, Delaware Courts have held that although there may be a subject matter overlap in the State work and the post-employment work, that where a former State official was not involved in a particular matter while with the State, then he was not "directly and materially responsible" for that matter. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004, J. Terry (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del. January 29, 1996). In *Beebe*, while with the State, an official's responsibilities were to review and make decisions on applications from hospitals to expand their services. It was alleged that he was violating the post-employment law because after he left the State he was representing a hospital on its application. However, the Court found that as to the particular application before his former agency for Nanticoke Hospital, he had not been involved in that matter while with the State, so he was not "directly and materially responsible" for that particular matter.

The Federal Courts have stated that "matter" must be defined broadly enough to prevent conflicts of interest, without defining it so broadly that the government loses the services of those who contemplate private careers after their public service. *Medico* at 843. To decide if Ms. Peppelman would be working on the same "matter," Courts have held that it is the same "matter" if it involves the same basic facts, the same parties, related issues and the same confidential information. *Ethical Standards in the Public Sector: A Guide for Government Lawyers, Clients, and Public Officials*, American Bar Association, Section of State and Local Government Law, Publisher; p. 38. Similarly, this Commission has held that the facts must overlap substantially. *Commission Op. No. 96-75 (citing Medico at 842)*. See also *Beebe*.

To ascertain if there is a substantial overlap, the Commission ordinarily compares the duties and responsibilities during employment to the post-employment activities. However, in

this case, you acknowledged that your request to contract with Ms. Peppelman to perform her former job duties was a violation of the two year post-employment restriction in the Code of Conduct. Instead, you asked the Commission, on behalf of PBHS, to consider a waiver based upon agency hardship.

B. Waivers may be granted if there would be an undue hardship on the State employee or State agency, or the literal application of the law is not necessary to serve the public purpose. 29 Del. C. § 5807(a).

(1) "Undue hardship," means "more than required" or is "excessive." *Commission Op. No. 97-18 (citing Merriam Webster's Collegiate Dictionary, p. 1290 (10th ed. 1992)).*

You posted the vacancy well in advance of Ms. Peppelman's retirement. Even so, the posting only attracted two qualified applicants. Both of those applicants withdrew their application because of the low salary. In response, you requested approval to hire an applicant above the \$44,000 minimum salary which was denied. The position remained posted on the State website during the year the waiver was in effect. You had also posted the vacancy on a national website in the hopes of attracting a larger pool of applicants. Prior to granting the original waiver, WIC was out of compliance with the federal grant requirements, unable to meet its obligations to the University and to the public.

One factor the Commission evaluates when deciding to grant a waiver is whether the employee would be making more money as a contract employee than they were earning as a full-time State employee. Consideration of that factor is important when determining whether an employee, or ex-employee, has left State employment for the purpose creating a vacancy which would allow them to return as a contract employee at a higher salary. When asked about Ms. Peppelman's compensation as a contract employee, you stated Ms. Peppelman was earning less money than what she was earning when she left State employment and that continues to be the case.

Based on your difficulty recruiting qualified applicants, WIC's need to comply with the criteria of the federal grant, WIC's obligations to the University and the fact that the vacancy was not created to reap a financial benefit, the Commission decided to grant your agency's request for a hardship waiver of the post-employment restriction for a period of one year. During that year, you continued to post the opening on the State website and also posted the vacancy on other websites to attract a greater pool of applicants. As a result, you have successfully recruited a candidate to fill the position. Her start date is in December 2017.

You asked the Commission to extend the original waiver for another six months to allow Ms. Peppelman to train your new employee. As you described during the 2016 meeting, there are very compelling reasons to make sure the WIC program continues to run efficiently. Your new employee, although qualified for the position, has never worked for state government. You believe Ms. Peppelman's assistance in training the new employee would be invaluable and would prevent any lapses in services provided by your Division. The Commission agrees for all of the reasons supporting the original waiver.

(2) Is literal application of the law necessary to serve the public purpose?

The overall purpose of the Code of Conduct is to instill the public's confidence in its government. 29 Del. C. § 5802(1) and (2). In discussing the federal post-employment law, which is similar to Delaware's, the United States Congress noted that public confidence in

government has been weakened by a widespread conviction that government officials use their public office for personal gain, particularly after leaving the government. *"Ethics in Government Act," Senate Report No. 95-1770, p. 32.* In extending its post-employment law from one year to two years on matters within the official's former responsibility, Congress said the two-year requirement was justified because:

Today public confidence in government has been weakened by a widespread conviction that officials use public office for personal gain, particularly after they leave government services. There is a sense that a "revolving door" exists between industry and government; that officials 'go easy' while in office in order to reap personal gain afterward.... There is a deep public uneasiness with officials who switch sides—.... Private clients know well that they are hiring persons with special skill and knowledge of particular departments and agencies. That is also the major reason for public concern.
Id.

On the other hand, the Code also seeks to encourage citizens to assume public office and employment by not "unduly circumscribing their conduct." 29 *Del. C.* § 5802(3). Thus, in setting the post-employment standard, the General Assembly did not place a total ban on former employees representing or otherwise assisting a private enterprise on matters involving the State. It merely placed a restriction on post-employment activity involving matters for which the former employee (1) gave an opinion; (2) conducted an investigation, or (3) was otherwise directly and materially responsible for while employed by the State. 29 *Del. C.* § 5805(d) .
Commission Op. 01-07.

Here, there were limited resources from which you could recruit to fill the vacancy. Now that you have filled that vacancy, the employee should be properly trained. In the meantime, the public has an interest in making sure that low-income individuals have access to resources which provide them with proper nutrition. Additionally, when the Commission grants a waiver, the decision becomes a matter of public record. That ensures that the public knows why a former State employee was allowed to contract with the State in contravention of the Code.

III. CONCLUSION

The Commission decided to GRANT your agency's request to extend your hardship waiver for a period of six months.

Sincerely,

/s/ *William F. Tobin, Jr.*

William F. Tobin, Jr.
Chair

Motion in accordance with the above letter waiver. Moved—Commissioner Lessner; seconded—Commissioner Smith. Vote 5-0, approved.

10. 17-30– Post Employment

[Employee] worked for [a State agency where he supervised 32 employees in two separate sections]. [Employee] did not work on individual projects. He retired on July 14, 2017.

[Employee] accepted a position with [a contractor of his former employer] effective September 5, 2017. He intended to open and manage a Delaware office. [Employee] would be seeking [agency] contracts on behalf of his new employer. He anticipated the contracts would be [with different sections of his former State agency].

[Employee] asked the Commission to decide if his new position violated the two year post-employment restriction in the Code of Conduct.

For 2 years after leaving State employment, State employees may not represent or otherwise assist a private enterprise on matters involving the State, if they are matters where the former employee: (1) gave an opinion; (2) conducted an investigation, or (3) were otherwise directly and materially responsible for the matter while employed by the State. 29 Del. C. § 5805(d).

One reason for post-employment restrictions is to allay concerns by the public that ex-government employees may exercise undue influence on their previous co-workers and colleagues. *United States v. Medico*, 784 F.2d 840, 843 (7th Cir., 1986). Nevertheless, Delaware Courts have held that although there may be a subject matter overlap in the State work and the post-employment work, that where a former State official was not involved in a particular matter while with the State, then he was not “directly and materially responsible” for that matter. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004, J. Terry (Del. Super. June 30, 1995), *aff’d.*, No. 304 (Del. January 29, 1996). In *Beebe*, while with the State, an official’s responsibilities were to review and make decisions on applications from hospitals to expand their services. It was alleged that he was violating the post-employment law because after he left the State he was representing a hospital on its application. However, the Court found that as to the particular application before his former agency for Nanticoke Hospital, he had not been involved in that matter while with the State, so he was not “directly and materially responsible” for that particular matter.

The Federal Courts have stated that “matter” must be defined broadly enough to prevent conflicts of interest, without defining it so broadly that the government loses the services of those who contemplate private careers after their public service. *Medico* at 843. To decide if [Employee] would be working on the same “matter,” Courts have held that it is the same “matter” if it involves the same basic facts, the same parties, related issues and the same confidential information. *Ethical Standards in the Public Sector: A Guide for Government Lawyers, Clients, and Public Officials*, American Bar Association, Section of State and Local Government Law, Publisher; p. 38. Similarly, this Commission has held that the facts must overlap substantially. *Commission Op. No. 96-75 (citing Medico at 842)*. See also *Beebe*.

To determine if there is substantial overlap, the Commission compared the duties and responsibilities during employment to the post-employment activities. Like the matter in *Beebe*, [Employee] worked on the subject matter while working for the State. However, the court in *Beebe* drew a specific line between the subject matter and its application to specific facts. In analogous situations the Commission has approved post-employment positions for workers who leave State employment to work for one of the agency’s contractors so long as they do not work

on the same projects. *Commission Ops. 12-09 and 13-41*. The Commission is to strive for consistency in their opinions. 29 Del. C. § 5809(5).

It was clear to the Commission that [Employee] would not be working on any projects for which he was previously responsible while employed by the State because he did not work on any individual projects. In addition, he stated he would not be working on [a specific type of] project for the next two years. [Employee] mentioned that he planned to appear before [State] selection committees. However, he stated those committees would be staffed by State employees with whom he did not previously have professional responsibilities, thus ameliorating the concern he would be interacting with his former co-workers.

The Commission reminded [Employee] of the prohibition against revealing confidential information gained during his employment with the State. 29 Del. C. § 5805(d).

Motion: [Employee]'s post-employment position did not violate the Code of Conduct as long as he did not work on [a specific type of project]. Moved—Commissioner Anderson; Commissioner Whetzel. Vote 4-1, approved. (Commissioner Tobin voting against).

11. 17-26– Post Employment

[Employee] worked for [a State agency] as a Program Manager. He held that position from January 2016, until he resigned on September 8, 2017. [Employee] accepted a position with an [agency] vendor. [Employee] provided a list of the most recent [agency] contracts on which he worked as well as a list of [the vendor's] contracts. [Employee] asked the Commission to decide if his new position violated the two year post-employment restriction in the Code of Conduct.

For 2 years after leaving State employment, State employees may not represent or otherwise assist a private enterprise on matters involving the State, if they are matters where the former employee: (1) gave an opinion; (2) conducted an investigation, or (3) were otherwise directly and materially responsible for the matter while employed by the State. 29 Del. C. § 5805(d).

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The Federal Courts have stated that “matter” must be defined broadly enough to prevent conflicts of interest, without defining it so broadly that the government loses the services of those who contemplate private careers after their public service. *Medico* at 843. To decide if [Employee] would be working on the same “matter,” Courts have held that it is the same “matter” if it involves the same basic facts, the same parties, related issues and the same confidential information. *Ethical Standards in the Public Sector: A Guide for Government Lawyers, Clients, and Public Officials*, American Bar Association, Section of State and Local Government Law, Publisher; p. 38. Similarly, this Commission has held that the facts must overlap substantially. *Commission Op. No. 96-75 (citing Medico at 842)*. See also *Beebe*.

To determine if there was substantial overlap, the Commission compared the duties and responsibilities during employment to the post-employment activities. Like the matter in *Beebe*, [Employee] worked on the subject matter while working for the State. However, the court in *Beebe* drew a specific line between the subject matter and its application to specific facts. In analogous situations the Commission had approved post-employment positions for [Agency] workers who left State employment to work for one of the agency’s contractors so long as they did not work on the same projects. *Commission Ops. 12-09 and 13-41*. The Commission is to strive for consistency in their opinions. 29 Del. C. § 5809(5).

As long as [Employee] did not work on any of the projects he was previously responsible for while employed by the State, it was unlikely his new position would violate the post-employment restriction. He specifically asked about his ability to work on [a specific project] as a Project Manager. While at [his former agency] his involvement on the project was limited to reviewing one document. The Commission decided that his limited involvement did not entirely preclude him from working on the project on behalf of his new employer because it was not a project for which he was materially responsible. [Employee] also asked about his ability to work on [the agency’s] Requests for Proposals (“RFP”) for new projects. Because he had previously served on an [agency] selection committee and because selection committees were likely to be staffed by his former co-workers, the Commission decided he could not appear before the [agency’s] selection committee until after the expiration of the two year post-employment restriction. That prohibition did not affect his ability to work on bids, only that he could not be physically present when the bid was discussed with the [agency’s] selection committee.

The Commission also reminded [Employee] of the prohibition against revealing confidential information gained during his employment with the State. 29 Del. C. § 5805(d).

Motion: [Employee]’s position did not violate the post-employment restriction in the Code of Conduct as long as he did not appear before [the agency’s] selection committees for two years. Moved—Commissioner Anderson; seconded—Commissioner Smith. Vote 5-0, approved.

12. 17-36--Post Employment (accompanied by her attorney).

[Employee] was [a manager of a State agency]. Her job duties included: overseeing the operations and implementation of service programs; rules and regulations compliance; budget preparation and monitoring; legislative drafting; representing her Division on various task forces and committees. [Employee] wanted to retire from State service and accept a position with [one of her agency’s vendors].

[Employee] wanted to work as a manager in [the vendor’s] Finance and Billing Department. According to the job description she provided her duties would include: preparing

the annual budget; cost allocation planning; preparing and updating the monthly accounts receivable report; preparing and submitting invoices. The position was an internal finance position which required the same skill set as her State position, but did not require her to have any contact with [her former agency].

[Employee] asked the Commission to decide if her proposed employment as a manager would be a violation of the two year post-employment restriction in the Code of Conduct.

For 2 years after leaving State employment, State employees may not represent or otherwise assist a private enterprise on matters involving the State, if they are matters where the former employee: (1) gave an opinion; (2) conducted an investigation, or (3) were otherwise directly and materially responsible for the matter while employed by the State. 29 Del. C. § 5805(d).

One reason for post-employment restrictions is to allay concerns by the public that ex-government employees may exercise undue influence on their previous co-workers and colleagues. *United States v. Medico*, 784 F.2d 840, 843 (7th Cir., 1986). Nevertheless, Delaware Courts have held that although there may be a subject matter overlap in the State work and the post-employment work, that where a former State official was not involved in a particular matter while with the State, then he was not “directly and materially responsible” for that matter. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004, J. Terry (Del. Super. June 30, 1995), *aff’d*, No. 304 (Del. January 29, 1996). In *Beebe*, while with the State, an official’s responsibilities were to review and make decisions on applications from hospitals to expand their services. It was alleged that he was violating the post-employment law because after he left the State he was representing a hospital on its application. However, the Court found that as to the particular application before his former agency for Nanticoke Hospital, he had not been involved in that matter while with the State, so he was not “directly and materially responsible” for that particular matter.

The Federal Courts have stated that “matter” must be defined broadly enough to prevent conflicts of interest, without defining it so broadly that the government loses the services of those who contemplate private careers after their public service. *Medico* at 843. To decide if [Employee] would be working on the same “matter,” Courts have held that it is the same “matter” if it involves the same basic facts, the same parties, related issues and the same confidential information. *Ethical Standards in the Public Sector: A Guide for Government Lawyers, Clients, and Public Officials*, American Bar Association, Section of State and Local Government Law, Publisher; p. 38. Similarly, this Commission has held that the facts must overlap substantially. *Commission Op. No. 96-75 (citing Medico at 842)*. See also *Beebe*.

To determine if there was substantial overlap, the Commission compared the duties and responsibilities during employment to the post-employment activities. Both [the vendor and her State agency worked in similar fields]. However, the *Beebe* court ruled that subject matter overlap was not enough to trigger application of the post-employment restriction. Instead, the court looked at the specific facts and parties involved in each matter to determine if the employee had previously given an opinion about, or been materially responsible for, the same matter while employed by the government entity. *Beebe, supra*. While [Employee] had worked with [the vendor’s] staff on a limited basis as a State employee, she denied associating with their employees on a personal basis. In addition, her proposed work appeared to be completely internal and did not require her to have contact with her former State co-workers. Subsequently, the Commission did not find there was sufficient overlap between her proposed

position and her work as a State employee to support a violation of the post-employment restriction in the Code of Conduct.

Motion: [Employee]’s work as a manager would not violate the two year post-employment restriction in the Code of Conduct. Moved—Commissioner Anderson; seconded—Commissioner Smith. Vote 4-0, approved. (Commissioner Whetzel recusing).

13. 17-34--Outside Employment

[Employee] was a casual/seasonal employee who worked for [a State agency]. She was assigned to work in Wilmington.

[Employee] also worked for [one of her agency’s vendors] in Milford. [Employee] stated that she had never referred one of her [State] clients to [the vendor]. In the event that one of her previous [State] clients was later [referred to the vendor, Employee] stated her supervisor had agreed to allow her to recuse herself from that client. The client would be treated by another worker in [a different location].

A. State employees with a financial interest in a private enterprise that does business with the State must file a full disclosure as a condition of commencing and continuing employment with the State. 29 Del. C. § 5806(d). “Financial interest” in a “private enterprise” includes private employment. 29 Del. C. § 5804(5)(b).

[Employee] filed the required ethics disclosure.

B. Under 29 Del. C. § 5806(b), State employees may not accept other employment if acceptance may result in:

(1) impaired judgment in performing official duties:

To avoid impaired judgment in performing official duties, State employees may not review or dispose of matters if they have a personal or private interest. 29 Del. C. § 5805(a)(1). [Employee]’s State clients were [dissimilar to the vendor’s clients]. The difference between the two made it unlikely she would have an opportunity to exercise her official judgment in matters related to her private interest. In the unlikely event she was to have contact with a State client while working [for the vendor] she had already implemented an acceptable recusal strategy to mitigate the conflict.

(2) preferential treatment to any person:

The next concern addressed by the statute is to insure co-workers and colleagues are not placed in a position to make decisions that may result in preferential treatment to any person. [Employee] may not represent or assist her private interest before her own agency. 29 Del. C. § 5805(b)(1). When working for the private business, [Employee] worked with clients who had been referred to [the vendor] by employees of her own agency. However, those [State workers] were not her immediate co-workers. The Commission did not see how the mere fact that the [vendor’s] clients were referred by employees working for her State agency would cause her to show preferential treatment to anyone.

(3) official decisions outside official channels:

There were no facts to suggest that [Employee] would make official decisions outside official channels. That is not to say she would do so, she was entitled to a strong presumption of honesty and integrity. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del., January 29, 1996).

(4) any adverse effect on the public's confidence in the integrity of its government:

The purpose of the code is to insure that there is not only no actual violation, but also not even a "justifiable impression" of a violation, 29 *Del. C.* § 5802, the Commission treats this provision as an appearance of impropriety standard. *Commission Op. No. 07-35*. The test is whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the State duties could not be performed with honesty, integrity and impartiality. *In re Williams*, 701 A.2d 825 (Del. 1997). As long as [Employee] continued to work with [dissimilar client populations], her dual roles were unlikely to create an appearance of impropriety amongst the public because she would not be working with the same clients.

In deciding if the conduct would raise the appearance of impropriety, the Commission also considered whether the outside employment would be contrary to the restrictions on misuse of public office. 29 *Del. C.* § 5806(e). One prohibition considered by the Commission under that provision is the State employee may not use State time or State resources (i.e. computer, fax, phone, etc.) to work on the private business. [Employee] stated that she worked for [the vendor] outside of her State work hours. Nonetheless, she must be careful to restrict phone calls and emails related to her private employer to hours that did not coincide with her State work hours.

Motion: [Employee's outside employment] did not create a conflict of interest with her State job duties as long as she recused as necessary. Moved—Commissioner—Lessner; seconded—Commissioner Anderson. Vote 5-0, approved.

14. Motion to go out of Executive Session: Moved—Commissioner Whetzel, seconded—Commissioner Tobin. Vote 5-0, approved.

15. Adjournment

ⁱ Pursuant to 29 *Del. C.* § 10004(6) to discuss non-public records (29 *Del. C.* § 10002(6) Any records specifically exempted from public disclosure by statute or common law), as the written statements required for advisory opinions and complaints are subject to the confidentiality standards in 29 *Del. C.* § 5805(f), 29 *Del. C.* § 5807(d) Advisory Opinion Requests, and 29 *Del. C.* § 5810(h) for Complaints. Further, the proceedings, like personnel actions are, by statute, closed unless the applicant for the advisory opinion requests a public meeting, 29 *Del. C.* § 5805(f), 29 *Del. C.* § 5807(d), or the person charged in a complaint requests a public meeting. 29 *Del. C.* § 5810(h). No applicant for an advisory opinion, nor a person charged by a complaint has requested an open meeting.